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No. 84-497

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LEE M. THOMAS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Appellant,

v.

UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY, INC., *et al.*,
Appellees.

On Appeal From The United States District Court For The Southern District Of New York

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BRIEF OF APPELLEES UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY, INC., *et al.*

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QUESTIONS PRESENTED

1. Whether compulsory arbitration of private monetary claims between individuals, with no opportunity for judicial review, violates Article III of the Constitution.

2. Whether Congress' delegation of legislative power to an arbitrator to decide how to compensate an owner for the use of his proprietary information by others, with no statutory standard and no judicial review, violates Article I of the Constitution.

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BRIEF OF APPELLEES UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY, INC., *et al.*

STATEMENT

Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862, 2874 (1984) (*"Monsanto"*), held that trade secret pesticide research data are a form of property recognized by the

Constitution. The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.* (1982), affords the original submitter of these data the right to be compensated when his data are used by the Environmental Protection Agency (EPA) at the request of a subsequent applicant to support a copycat ("me-too") pesticide registration. FIFRA § 3(c)(1)(D)(ii).

In the absence of agreement between the parties, the submitter can obtain compensation only through binding arbitration under the auspices of the Federal Mediation and Conciliation Service (FMCS), a labor mediation agency that has no expertise in resolving commercial disputes.[1] *Id.* The arbitrator appointed by FMCS is not an Article III judge, having neither non-diminishable compensation nor lifetime tenure, but is selected individually for each case.

FIFRA provides the arbitrator with no standard for deciding how compensation is to be determined, and the arbitrator's decision is "final and conclusive." Neither the submitter nor the applicant may obtain review of the decision in an Article III court, absent fraud or misrepresentation. *Id.* A submitter who refuses to participate in an arbitration proceeding forfeits his right to compensation. *Id.*

In *Monsanto*, the Court defined the extent to which the use of trade secret research data under FIFRA does, and does not, constitute a taking under the Fifth Amend-

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[1] Because FMCS "rarely arranges or conducts arbitration of commercial disputes," 45 Fed. Reg. 55,395 (1980), it appoints arbitrators to FIFRA cases from the roster of the American Arbitration Association. 29 C.F.R. § 1440.1 (1984). The Director of FMCS serves at the pleasure of the President. 29 U.S.C. § 172 (1982).

ment.[2] However, the Court deferred any decision on the constitutionality of the arbitration scheme under Article III because Monsanto's data (unlike appellees' data here) had not been used to support me-too registrations, so that Monsanto had no extant right to obtain compensation. *Monsanto*, 104 S. Ct. at 2882.

Appellees are inventors and producers of chemical and biological pesticides. In order to obtain federal pesticide registrations for their products, they have submitted to EPA voluminous research and test data. These data have been used by EPA repeatedly at the request of subsequent applicants to support me-too registrations for which no agreement on compensation has been reached by the parties.[3] Appellees thus have an existing right to be compensated for the use of their trade secret and proprietary data. But to obtain the compensation now due, appellees must either accept the adjudication of their claims by an arbitrator without recourse to an Article III court, or forfeit compensation altogether.

This case presents the question that the Court deferred in *Monsanto:* whether it is unconstitutional to require appellees to submit the adjudication of private compensa-

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[2] Pursuit of compensation under FIFRA is a prerequisite to the filing of any available Fifth Amendment taking claim against the United States. *Monsanto*, 104 S. Ct. at 2881 & n.21. If no taking claim is available (as is the case, for example, for data submitted before 1972 or after 1978), compensation from the applicant under FIFRA is the submitter's only remedy for the use of his data. *See infra* note 13.

[3] As of October 1983, appellees had identified approximately two dozen me-too registrations that had been issued by EPA using appellees' data (Docket Entry No. 132 at 2), and since that time have identified numerous others.

tion claims to an arbitrator who is not under the authority of an Article III court.

A. The Importance Of Compensation

The development of a pesticide that is safe to humans and the environment, but that is effective in controlling a specific pest, is an arduous and expensive undertaking that requires years of painstaking research. "The development process may take between 14 and 22 years, and it is usually that long before a company can expect any return on its investment." *Monsanto*, 104 S. Ct. at 2871. For every successful candidate that ultimately reaches the market, appellees must test an average of 20,000 others. *Id.* The research to develop a pesticide typically costs tens of millions of dollars.[4]

These costs are exacerbated by federal regulation. The licensing of pesticides under FIFRA keeps new products off the market while expensive health, safety and environmental testing is being performed and while the test results are undergoing EPA review. The effect is to increase costs still further, substantially delay the production of income from the new product, significantly shorten the term of any available patent protection, and lengthen the period before the innovator can expect any return on its investment.[5]

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[4] The National Agricultural Chemicals Association reported that manufacturers spent $580 million for pesticide R&D in 1983. National Agricultural Chemicals Association, 1983 Industry Profile Survey, at 7. *See also Monsanto*, 104 S. Ct. at 2871.

[5] Office of Technology Assessment, U.S. Congress, Technological Innovation and Health, Safety and Environmental Regulation, at VIII-47 (1981); The Conservation Foundation, Product Regulation and Chemical Innovation, at IV-33 (1980).

Companies that produce copycat pesticide products ("me-too" registrants) do not share the burdens of federal regulation. They do not risk millions of dollars to test a product, taking the chance that EPA ultimately may disapprove it. They do not suffer marketing delay because of the regulatory regimen of testing and review, but on the contrary can avoid testing and obtain a me-too registration within days once the innovator's original product has been approved. Compensation under FIFRA is the principal mechanism available to correct the imbalance caused by the burdens of environmental regulation that would otherwise be borne by the innovator alone.[6]

Many of the research data submitted to EPA by appellees constitute trade secrets. (J.A. 56–63.)[7] Trade secret data have added value, not merely because they unlock the door to registration in this country and around the world, but also because they provide insights for expanding the uses of a pesticide and for developing additional related products. *Monsanto*, 104 S. Ct. at 2871. The data also contain state-of-the-art testing methodologies.[8] This information is of substantial value to competitors and satisfies the requirements for trade secrets under state law. *Id.* at 2871, 2873. In a compensation case, the valua-

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[6] FIFRA also grants innovators a 10-year period of exclusive use for data on new active ingredients registered after September 30, 1978. FIFRA § 3(c)(1)(D)(i). This provision does nothing to protect data concerning the vast majority of pesticides registered before 1978.

[7] The following abbreviations are used in this brief: "J.A." (Joint Appendix); "J.S. App." (Appendix to EPA's Jurisdictional Statement); "EPA Brief" (brief on the merits for the appellant).

[8] *See, e.g.*, Affidavit of Haney B. Camp, Docket Entry No. 76 at 9; Affidavit of John F. McCarthy, Ph.D., Docket Entry No. 94 at 8.

tion of the right to use these trade secret data is a necessary part of the determination of the award.

B. The Stauffer Arbitration

One of the appellees has been through the entire arbitration process. Data developed by appellee Stauffer Chemical Company ("Stauffer") on two of its most important and successful herbicides, with sales of hundreds of millions of dollars in the United States, were used at the request of PPG Industries, Inc. ("PPG") (among others), a large competing manufacturer, to support the issuance of me-too registrations in 1981. (J.S. App. 2a.) After unsuccessful negotiations, Stauffer attempted to obtain compensation from PPG for the use of data concerning one of these herbicides by initiating an arbitration in April 1982.

The arbitrators were selected by FMCS in a manner which Stauffer believes was severely prejudicial. (J.A. 34–37.) The prejudice stemmed from the fact that FMCS held a "Pesticide Data Disputes Training Seminar" for prospective FIFRA arbitrators in October 1980, which was organized and conducted by EPA. *Id.* Despite the fact that FIFRA contains no standard for determining compensation (*see* Part III *infra*), representatives from EPA's General Counsel's Office instructed the cadre of neophyte FIFRA arbitrators at the training session how they should compute compensation. *Id.*[9] The instruction given by EPA counsel advocated legal interpretations on key substantive issues with which Stauffer disagreed and

[9] In 1977, former EPA Administrator Douglas Costle asked Congress to divest the Agency of the responsibility for determining compensation because this is a subject in which EPA "lacks expertise." H.R. Rep. No. 343 (Part I), 95th Cong., 1st Sess. 8, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1966, 1974.

which have the effect of reducing the amount of compensation that can be awarded. *Id.*[10]

Stauffer, as the initiator of the arbitration, requested the opportunity to select an arbitrator from among a panel of persons who had not been instructed in EPA's interpretations of compensation issues. FMCS denied Stauffer's request and insisted that three arbitrators be chosen, and that all three be indoctrinees of the EPA training session. *Id.* at 38–39. In Stauffer's view, the instruction by EPA counsel biased the arbitration tribunal against the use of valuation methods that would result in a fair award.

After a hearing, the EPA-trained and FMCS-appointed arbitrators awarded far less than Stauffer had requested. They awarded Stauffer only $1.465 million plus a royalty of 15 cents per pound of herbicides sold by PPG for 10 years. *Stauffer Chemical Co. v. PPG Industries, Inc.*, No. 16 199 077 82 FIFRA (Am. Arb. Ass'n June 28, 1983) (J.A. 54). This was approximately $50 million less than the amount to which Stauffer believed it was entitled. Despite the fact that Stauffer is aggrieved by the award (J.S. App. 3a), FIFRA prohibits Stauffer from challenging the adequacy of the award in court.[11]

[10] In the court below, the EPA official who coordinated the training session for FMCS admitted that its "primary objective" was "to train the attendees to (1) determine which data are compensible [sic] and (2) to decide what is reasonable compensation." Affidavit of Robert Forrest, at 4, Docket Entry No. 101. The prospective arbitrators were given voluminous materials, including a chart prepared by EPA counsel "which set forth a method for systematically screening specific data for compensibility [sic]." *Id.* at 5.

[11] To aggravate Stauffer's injury, PPG has continued to enjoy the benefits of its me-too registrations based on Stauffer's data, but still has paid no compensation. Instead, shortly after the arbitration was

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C. The District Court Proceedings

The principal relief sought by Stauffer and the other appellees in the district court below was a declaration that the compulsory arbitration procedure is unconstitutional, and an injunction restraining further use of any data under § 3(c)(1)(D)(ii) for which compensation could not be obtained in an Article III court.

The district court agreed that it was a clear violation of Article III to compel appellees to submit to an unconstitutional arbitration tribunal in order to adjudicate their compensation rights, and therefore granted the relief that appellees requested. (J.S. App. 25a.) EPA filed a direct appeal from the district court's original judgment, which was pending at the time the Court decided *Monsanto*.

Monsanto was a Taking Clause case. Although Monsanto had raised an Article III claim as an ancillary argument in support of its Taking Clause theory, the Court declined to decide whether the arbitration system was defective under Article III in that case, because Monsanto's data had not actually been used by a me-too registrant and therefore Monsanto had no cognizable compensation claim. 104 S. Ct. at 2882.

EPA's original appeal in this case, then denominated *Ruckelshaus v. Union Carbide Agricultural Products*

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concluded, and despite FIFRA's prohibition against judicial review, PPG filed a suit in district court to challenge the award. PPG Industries, Inc. v. Stauffer Chemical Co., No. 83-1941 (D.D.C. filed July 7, 1983). In answering PPG's complaint, Stauffer filed counterclaims for cancellation of PPG's me-too registrations, or in the alternative (if the arbitration scheme were held to be constitutional), for enforcement of the arbitration award. (If FIFRA were constitutional, no augmentation of the award by the court would be permitted.)

Co., No. 83-1564, was remanded by the Court for further consideration in light of *Monsanto*. 104 S. Ct. 3566 (1984) (mem.). The Court expressed no view as to the merits of the district court's ruling.

On remand, appellees demonstrated to the district court that they were situated differently than Monsanto. Appellees' data had been used by competitors to obtain me-too registrations, and they had the immediate choice of either adjudicating their compensation rights in a non-Article III arbitration, or forfeiting them. Appellees also faced a "clear threat" of the continued use of their data by EPA to support other applicants' registrations. (J.S. App. 4a.) Furthermore, appellee Stauffer had been through an arbitration and was aggrieved by the lack of an impartial Article III forum, as well as by the tremendous shortfall in the award. (J.S. App. 3a.)

The district court agreed and held that nothing in *Monsanto* altered its original decision. (J.S. App. 4a.) EPA again took a direct appeal to this Court and obtained a stay of the judgment. Probable jurisdiction was noted.

SUMMARY OF ARGUMENT

I. This case is justiciable because appellees are squarely presented with a dilemma—they must either submit to an unconstitutional adjudication or forego a valuable right. Appellees' data have been used by EPA repeatedly to grant me-too registrations to others, giving rise to a right to be compensated. Appellees are now forced either to submit to an adjudication of their compensation rights in an arbitration forum which violates Article III, or to forfeit compensation altogether. As the district court below recognized, this compulsion gives rise to a justiciable case or controversy.

Although it is not necessary to suffer an unconstitutional arbitration in order to raise the Article III claim, appellee Stauffer has done so. The district court below found—*and EPA did not contest*—that Stauffer was injured both by the compulsion to resort to the unconstitutional arbitration procedure in order to obtain its statutory entitlement to compensation, and by the fact that it received an unreviewable award approximately $50 million less than the amount to which it claimed entitlement. Under these circumstances, FIFRA's preclusion of judicial review in an Article III court creates a justiciable controversy.

II. FIFRA's compulsion to adjudicate compensation rights before an arbitrator without judicial review violates Article III. The adjudication of private monetary claims between individuals—claims that arise under federal law and that require the valuation of state law trade secrets—is an exercise of the judicial power of the United States. FIFRA violates Article III by vesting the exercise of this judicial power in an arbitrator who is not an Article III judge.

This Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), contains three separate opinions (plurality, concurrence and dissent) which discuss the requirements of Article III. The FIFRA arbitration scheme does not satisfy the requirements expounded in any of these opinions.

Under the rationale of the plurality, compensation is a "private right" because it involves the liability of one individual to another. The determination of monetary liability is a matter that is inherently judicial and that must be resolved by an Article III court. The FIFRA arbitration scheme does not retain "the essential attributes of

judicial power" in Article III courts. Rather, FIFRA vests those powers in an arbitrator and bars substantive review of his decision by the Judiciary.

The concurring opinion in *Northern Pipeline* concluded that Congress may not deprive a litigant of the right to adjudicate state law claims in an Article III court. Although compensation arises under FIFRA, it requires the valuation of the right to use state law trade secrets. The compulsory arbitration of private monetary claims that require the valuation of trade secrets violates Article III.

The dissenting opinion in *Northern Pipeline* suggested that congressionally created adjudicative institutions do not violate Article III if they provide for appellate review by an Article III court. The FIFRA arbitration scheme bars all substantive review, and thus violates Article III under the rationale of the dissent.

III. Because FIFRA delegates legislative power to arbitrators to decide the basis on which to award compensation, without an ascertainable standard and without judicial review, it also violates Article I.

Three district courts, the former Administrator of EPA, and the agency (FMCS) to which Congress delegated authority over the arbitrators, all concluded that Congress provided no standard for the valuation of data for compensation purposes.

Important choices of social policy such as the decision how to compensate an innovator for use of his proprietary information by others must be made by Congress, not an *ad hoc* group of arbitrators. The absence of an intelligible principle for determining compensation, coupled with the preclusion of judicial review to check the abuse of the

arbitrators' undefined delegated authority, violates the Constitution's separation of powers.

IV. Having found FIFRA's arbitration scheme unconstitutional, the district court enjoined EPA from permitting any use of a submitter's data for which compensation should be, but is not, available in an Article III court. This relief was proper because FIFRA expressly conditions the use of a submitter's data upon payment of compensation. The purpose of the compensation requirement is to prevent competitors from obtaining a "free ride" or from "just plain stealing" the use of the submitter's proprietary data without paying for it.

Although Congress' attempt to establish an arbitration scheme with no set standard, insulated from the authority of the Judiciary, is unconstitutional, these features of the scheme are a fundamental part of the congressional design, and therefore must be reformed by Congress, not the courts. Congress' restructuring of the compensation scheme in 1978 was a deliberate effort to establish a private dispute resolution mechanism that does "not require active governmental involvement." The degree of judicial involvement necessary to bring FIFRA into compliance with Article III would directly contradict that design and thwart the congressional purpose of private dispute resolution.

The courts cannot engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide. As the Court similarly concluded in *Northern Pipeline*, it is for Congress to determine the proper manner of restructuring the arbitration scheme to conform to the requirements of Article I and Article III in a way that will best effectuate the legislative purpose.

The judgment of the district court should be affirmed.

ARGUMENT

I. THIS CASE IS JUSTICIABLE BECAUSE APPELLEES MUST EITHER SUBMIT TO AN UNCONSTITUTIONAL ARBITRATION OR FORFEIT COMPENSATION

EPA's argument that this case is not "justiciable" is specious. By distracting the Court's attention from the merits, EPA hopes to avoid having the Court focus on the glaring Article III flaw in FIFRA's compensation scheme.

Appellees have been forced either to submit to adjudication of their compensation rights in an arbitration forum which violates Article III, or to forfeit compensation altogether. Because appellees' data have been used by EPA in numerous instances to grant me-too registrations to others, and appellees face a "clear threat" of further erosion of their rights (J.S. App. 4a), appellees now are squarely presented with this dilemma. The choice of either submitting to an unconstitutional adjudication, or foregoing a valuable right, is the kind of direct and immediate injury that clearly gives rise to a justiciable controversy. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 198 (1956). Appellees have a "personal right . . . to demand Article III adjudication" of their compensation claims, *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 541 (9th Cir.) (en banc), *cert. denied*, 105 S. Ct. 100 (1984), and the abridgement of that right creates a live case or controversy.

The *only* relief that possibly could redress this injury is that which was granted by the district court below. It is beyond the power of the courts to reform the compensation system so that it is in compliance with Article I and

Article III: that must be done by Congress. (*See* discussion *infra* in Part IV.) Compensation is the statutory *quid pro quo* for the use of a submitter's research data by a competitor. Therefore, where no constitutional forum is available to the submitter in which to obtain the compensation to which he is entitled, the only remedy which will prevent his injury is to enjoin the use of the submitter's data by others until Congress reforms the compensation scheme in a manner that complies with Article III. This was the relief granted by the district court, and it directly redresses appellees' injury. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978).

The relief granted by the district court was necessary to prevent further erosion of appellees' proprietary rights. Appellees are entitled to a "reasonable, certain and adequate provision for obtaining compensation" before the property rights in the trade secret data they have submitted to EPA are further disturbed. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124–25 (1974).

EPA suggests that the only manner in which the Article III claim can be raised is through a suit that seeks enlargement of an arbitration award. (EPA Brief at 16). This argument ignores the fact that such judicial review is precisely what Congress has forbidden, and that it is not within the courts' authority to restructure FIFRA so that Article III tribunals are empowered to augment compensation awards. Appellees are not required to pursue a remedy which does not exist in order to establish the justiciability of a suit which challenges the absence of that very remedy.

The district court therefore quite properly gave no credence to EPA's justiciability argument. Addressing it

in a footnote, the court observed that appellees were injured by "the statutory compulsion to participate in an arbitration procedure that is void *ab initio* as a matter of law and the deprivation thereby of any access to meaningful compensation for the use of their data by subsequent registrants." (J.S. App. 15a n.2.) The district court concluded that the "compulsion to arbitrate," and the fact that "plaintiffs' injuries here would be the direct product of the statutory plan," satisfied the criteria for justiciability. *(Id.)* The court observed that the justiciable injury of which plaintiffs complain is not the result of any specific arbitration; "rather it is the statutory compulsion to seek relief through arbitration to the exclusion of any other mechanism. That issue is clearly ripe for resolution." (*Id.* at 16a n.2.)

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), it was not necessary for Marathon to obtain a final Bankruptcy Court judgment in order to raise its Article III contention. Rather, Marathon filed a motion to dismiss before Northern's claims were adjudicated. "Marathon may object to proceeding further with this lawsuit on the grounds that if it is to be resolved by an agency of the United States, it may be resolved only by an agency which exercises '[t]he judicial power of the United States' described by Art. III of the Constitution." 458 U.S. at 89 (Rehnquist, J., concurring). "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Regional Rail Reorganization Act Cases*, 419 U.S. at 143 (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)).

Even if it were necessary to suffer an unconstitutional arbitration in order to raise the Article III claim, appellee Stauffer has done so. (J.S. App. 2a.) In the proceedings

below, the district court found, and *EPA did not contest* (J.S. App. 3a), that Stauffer had been injured by the compulsion to resort to the unconstitutional arbitration procedure in order to obtain its statutory entitlement to compensation—a procedure which resulted in an unreviewable award approximately $50 million less than the amount to which Stauffer claimed entitlement. This is not injury "in some abstract sense" (EPA Brief at 17), but is a concrete injury that stems from FIFRA's compulsion to use an unconstitutional arbitration system. The district court found that this too made Stauffer's claim ripe for review. (J.S. App. 4a.)

The issues raised are clearly justifiable.

II. FIFRA'S DELEGATION OF NON-REVIEWABLE JUDICIAL POWER TO ARBITRATORS VIOLATES ARTICLE III

A. The Compulsory Arbitration Scheme Violates The Language And Purpose Of Article III

Article III, Section 1, of the Constitution enunciates the principle that the "judicial Power of the United States" must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides institutional protections for that independence: life tenure and nondiminishable compensation. *Northern Pipeline*, 458 U.S. at 60.

The adjudication of private monetary claims between individuals—claims that arise under federal law and that require the valuation of state law trade secrets—is an exercise of the judicial power of the United States. FIFRA violates Article III by compelling appellees to submit the adjudication of these compensation rights to arbitrators who do not enjoy the constitutional protections afforded Article III judges, and by prohibiting Article III courts from exercising ultimate authority over the adjudication.

The independent Judiciary established by Article III serves a dual function. It prevents the aggrandizement of judicial power by the political branches of government, and guarantees that the process of adjudication remains impartial. *Northern Pipeline*, 458 U.S. at 57–58.

The compulsory arbitration scheme established by FIFRA contravenes both purposes. It intrudes on the power of the Judiciary by creating a legislative tribunal with plenary power to adjudicate monetary claims arising between individuals, a subject which is "inherently judicial." *Id.* at 68–69. It threatens the right to an impartial adjudication because FMCS has complete authority to select and appoint persons to serve as arbitrators on a case-by-case basis, without control by or accountability to any other branch of government. The data submitter thus is put in the untenable position of accepting a "judge" who is dependent upon a government agency for his appointment to each case, and whose decision cannot be reviewed by the Judiciary.[12]

The institutional defect of the arbitration scheme is illustrated by the arbitration between Stauffer and PPG, the first and only arbitration under this section of the statute. FMCS insisted on appointing as arbitrators only persons who had been instructed by EPA counsel how

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[12] An arbitrator appointed by FMCS enjoys far less independence than a bankruptcy judge sitting on the Article I court declared unconstitutional in *Northern Pipeline*. A bankruptcy judge held office for a fixed term of 14 years and could be removed from office only by a panel of Article III judges. His basic qualifications were set by the Senate. His salary, insofar as it was set by statute, was protected. *See Northern Pipeline*, 458 U.S. at 53.

compensation should be determined. Although FIFRA contains no standard which states how compensation should be decided, EPA formulated its own opinion and instructed the neophyte arbitrators as if that opinion were gospel. The instruction provided by EPA was contrary to the legal interpretations which Stauffer believes are correct. As a consequence, the arbitrators appointed by FMCS over Stauffer's objection adopted interpretations which minimized Stauffer's award. Yet FIFRA precluded Stauffer from obtaining review in an Article III court to determine whether the arbitrators' decision is inconsistent with the law and facts of the case.

It is obvious that FIFRA's compulsory arbitration scheme does not comply with the strictures of Article III, and as a result, poses the very threat to judicial impartiality that the Framers sought to avoid.

B. The Compulsory Arbitration Scheme Violates The Article III Precepts Enunciated In *Northern Pipeline*

FIFRA's arbitration scheme presents a far more egregious violation of Article III than the Bankruptcy Court adjudication held unconstitutional in *Northern Pipeline*. Because it bars *all* substantive control by the courts of the inherently judicial adjudication of private monetary claims, the FIFRA arbitration scheme fails to satisfy the Article III requirements enunciated in *Northern Pipeline* by the plurality (Justices Brennan, Marshall, Blackmun and Stevens), by the concurring Justices (Justices Rehnquist and O'Connor), or by the dissent (Justices White, Burger and Powell).

1. In the view of the *Northern Pipeline* plurality, matters of "private rights" (to the extent they are adjudicated in the federal system) can be decided only by Article III courts. Article III thus prohibits Congress from vesting

jurisdiction in legislative courts to decide private-rights disputes.

Private rights involve matters that are "inherently judicial," including "the liability of one individual to another under the law as defined." *Northern Pipeline*, 458 U.S. at 69–70 (citing *Crowell v. Benson*, 285 U.S. 22, 51 (1932)). Such private-rights disputes "lie at the core of the historically recognized judicial power." 458 U.S. at 70.

Public rights, on the other hand, need not be adjudicated by Article III courts. The public rights doctrine extends only to matters arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Northern Pipeline*, 458 U.S. at 67–68 (citing *Crowell v. Benson*, 285 U.S. at 50). A matter of public rights must at a minimum arise "between the government and others." *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929). Thus "the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing 'private rights' from 'public rights.' " *Northern Pipeline*, 458 U.S. at 69 n.23.

The adjudication of compensation under FIFRA clearly is a matter of private rights. The purpose of the proceeding is to determine "the liability of one individual to another under the law as defined." The compensation proceeding involves the valuation of the right to use trade secrets and other proprietary information. These are matters that are "inherently judicial" and that historically have been the subject of judicial actions. *See, e.g., Peabody v. Norfolk*, 98 Mass. 452 (1868); *Yovatt v. Winyard*, 1 Jac. & W. 394, 37 Eng. Rep. 425 (Ch. 1820).

The public rights doctrine does not apply here. FIFRA arbitrations do not arise "between the government and

others," but rather between two private individuals. The government is not a party to the arbitration. The government has no statutory duty in the private compensation proceeding other than "to appoint an arbitrator." § 3(c)(1)(D)(ii). Thus, the adjudication of compensation under FIFRA is a "private rights" matter and must reside under the control of Article III courts.

The *Northern Pipeline* plurality also observed that where a private right arises under federal law, Congress may create "adjunct" tribunals to assist Article III courts in certain factfinding functions. The plurality noted two principles that aid in determining the extent to which Congress may constitutionally vest traditional judicial functions in non-Article III officers. First, when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges. Second, the functions of the adjunct must be limited in such a way that "the essential attributes" of judicial power are retained in the Article III court. *Northern Pipeline*, 458 U.S. at 80–81.

In *Crowell v. Benson*, 285 U.S. 22 (1932), the Court ruled that the adjudication of federal statutory rights is subject to Article III requirements. "*Crowell* involved the adjudication of congressionally created rights" by an adjunct concerning employees' compensation from employers for work-related injuries occurring in navigable waters of the United States. *Northern Pipeline*, 458 U.S. at 78. The adjudication in *Crowell* was held to be "one of private rights," subject to Article III. *Crowell*, 285 U.S. at 51.

The Court found the adjunct scheme in *Crowell* consistent with Article III because "every compensation order

was appealable to the appropriate federal district court, which had the sole power to enforce it or set it aside, depending upon whether the court determined it to be 'in accordance with law' and supported by evidence in the record." *Northern Pipeline*, 458 U.S. at 78 (citing *Crowell*, 285 U.S. at 44–45, 48). The Court upheld Crowell's compensation scheme "in view of these limitations upon the Compensation Commission's functions and powers." 458 U.S. at 78. *See also United States v. Raddatz*, 447 U.S. 667, 676–77, 681–83 (1980).

There is no colorable argument that an arbitrator appointed *ad hoc* to adjudicate compensation under FIFRA can qualify as a factfinding "adjunct" of the Judiciary. FIFRA places *all* judicial functions in the arbitrator, and bars the Judiciary from exercising any meaningful authority. FIFRA provides that the findings and determination of the arbitrator shall be final and conclusive, and specifies that no official or court of the United States shall have power or jurisdiction to review any such findings and determination. § 3(c)(1)(D)(ii).

This scheme obviously does not retain "the essential attributes of judicial power" in Article III courts, as required by *Northern Pipeline* and *Crowell*. The most essential attribute of judicial power is the authority to decide questions of law. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). FIFRA expressly usurps this power from the Judicial Branch.

As the district court below concluded, "[t]here can be no question that on its very face § 3(c)(1)(D) fails to abide by this limitation." (J.S. App. 20a.)

> The use-compensation system utterly deprives the federal courts of any meaningful role in ensuring the provision of fair compensation to data submitters.

> The courts play no role in fact-finding. More importantly, however, they are barred from considering any matters of law arising from the substantive issues in dispute in an arbitration proceeding. Rather, their powers are limited to review for "fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator." This leaves the courts with no power to make any "informed, final determination" of a data submitter's right to compensation. Such an assignment of powers to arbitrators cannot be sustained in the face of Article III.

(Id.) Thus, the arbitration scheme plainly fails to meet the Article III requirements enunciated by the *Northern Pipeline* plurality.

2. Justices Rehnquist and O'Connor concurred in the judgment in *Northern Pipeline*, stating a narrower ground for their decision. The concurring Justices observed that Northern's claims against Marathon arose entirely under state law, and that no case had gone so far as to sanction the adjudication of such a claim, against the will of the litigant, in a non-Article III forum. 458 U.S. at 90–91. The concurring Justices did not find it necessary to define the nature of the Article III requirements that apply to the adjudication of congressionally created rights.

Although compensation under FIFRA is a federal right, it requires the valuation of state law trade secrets. In the court below, appellees demonstrated that many of the research data they had submitted to EPA were trade secrets under the appropriate state law, and EPA did not contest these assertions. (J.A. 56–63.) *See Monsanto*, 104 S. Ct. at 2871, 2873. During the course of a compensation proceeding, the arbitrator must decide what value to place on the right to use these trade secrets.

The submitter also may have a right to obtain just compensation for the use of some of these trade secrets under the Tucker Act. *Id.* at 2882. In those instances, the valuation of the trade secret data in a FIFRA compensation proceeding is a prerequisite to the filing of a taking claim in the Claims Court. *Id.* at 2881.[13]

Thus, the holding of the concurring Justices in *Northern Pipeline* also is applicable to the FIFRA arbitration scheme. The compulsory adjudication of appellees' private monetary claims by an arbitrator, which requires the valuation of the right to use state law trade secrets, violates Article III.

3. The dissenting Justices in *Northern Pipeline* offered a different statement of the question for decision. That question was what limits Article III places on Congress' ability to create adjudicative institutions designed to carry out federal policy established pursuant to the substantive authority given Congress elsewhere in the Constitution. 458 U.S. at 94. The dissenting Justices argued that it is incorrect to parse Article III's requirements on the basis of whether the controversy to be adjudicated arises under state rather than federal law. *Id.* at 97.

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[13] For example, Stauffer submitted trade secret data between October 21, 1972 and September 30, 1978 which were relied on by EPA in granting me-too registrations to PPG. (J.S. App. 2a; J.A. 59–61.) The adjudication of the value of these trade secret data was a prerequisite under *Monsanto* to Stauffer's filing of a taking claim against the United States for the use of these data. Stauffer submitted many data after September 30, 1978, however, which also were relied on in supporting PPG's registrations. *Id.* No taking claim is available for the use of these post-1978 trade secret data. The *only* remedy is compensation under FIFRA. *Monsanto*, 104 S. Ct. at 2876.

Instead, the dissent suggested that "the presence of appellate review by an Art. III court will go a long way toward insuring a proper separation of powers." *Id.* at 115. Appellate review of the decisions of legislative courts provides "a firm check on the ability of the political institutions of government to ignore or transgress constitutional limits on their own authority." *Id.*

> Obviously, therefore, a scheme of Art. I courts that provides for appellate review by Art. III courts should be substantially less controversial than a legislative attempt entirely to avoid judicial review in a constitutional court.

Id.

The FIFRA artibration scheme does not satisfy the requirements of Article III as viewed by the dissenting Justices. FIFRA bars substantive appellate review in Article III courts. This leaves FMCS free to appoint arbitrators, as it did in the Stauffer arbitration, who have been isntructed to apply compensation policies that it favors and to refuse to appoint arbitrators who do not follow these policies. There is no check on the ability of FMCS or the artibrators it appoints to ignore statutory, common law or constitutional limits on their own authority.[14]

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[14] *Amicus* PPG proffers the argument that the provision of FIFRA which permits judicial review in cases of "fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator" is sufficient to satisfy the requirement for Article III review. Essentially, PPG contends that such "other misconduct" includes errors of law by the arbitrators. (Brief for PPG Industries, Inc. as *Amicus Curiae*, at 23–24.) The authorities are clear, however, that review for misconduct under arbitration statutes is limited to an inquiry into whether the parties were given a full and fair opportunity to participate and present evidence, and does not allow consideration of the merits of the award. Totem Marine Tug & Barge, Inc. v. North American Towing, Inc., 607 F.2d 649 (5th Cir. 1979); Local Union No. 251 v. Narragansett Improvement Co., 503 F.2d 309 (1st Cir. 1974). Even under arbitration statutes which expressly provide for judicial review, an error of law is not a basis for review of an arbitrator's decision. *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 436–37 (1953); In re I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424, 432 (2d Cir. 1974).

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Further, there is no compelling justification for Congress' decision in 1978 to remove compensation cases from Article III courts. Before 1978, compensation cases were decided by EPA, with a right of appeal to the federal district courts. *Monsanto*, 104 S. Ct. at 2868. Although it is understandable that Congress would wish to rid EPA of the chore of deciding compensation cases, there was no pressing need for withdrawing such matters from the cognizance of the Judiciary.[15] The nature of the issues in such cases—the valuation of the right to use an owner's trade secrets and proprietary data for competitive purposes—is one with which the courts are quite familiar. Certainly arbitrators chosen on an *ad hoc* basis are no better equipped to decide such issues than are federal district judges.

In short, the FIFRA arbitration scheme makes no provision even for the limited appellate review by Article III courts provided in the Bankruptcy Act that the dissenting justices found sufficient for Article III purposes in *Northern Pipeline*. It thus fails to meet any Member of the Court's construction of Article III's requirements.

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[15] At the time FIFRA was amended in 1978, *there was not a single compensation case* that had been tried administratively before EPA, nor obviously had any appeals been taken to the federal courts.

C. EPA Has Ignored The Article III Issue In This Case

EPA's sole contribution to resolving the Article III issue posed in this case is to argue that compensation under FIFRA is a federally-created right; that *Northern Pipeline* only pronounced Article III requirements for state-created rights; and that Congress' creation of mandatory data licensing and compensation procedures was within its general constitutional authority. (EPA Brief at 20–28.)

This vacuous argument does not advance the resolution of the issue that is before the Court: the extent to which Article III limits Congress' authority to create legislative courts to adjudicate federally-created rights, particularly where, as here, the adjudication also requires the valuation of trade secret property rights created under state law.

The implicit contention in EPA's argument is that when Congress creates a statutory right, it may deposit all judicial power to adjudicate that right wholly within legislative courts, to the exclusion of the Judiciary, as long as the subject matter generally is within Congress' constitutional powers. This proposition was rejected in *Northern Pipeline* and a long line of prior decisions of this Court as well.[16] No case has ever accepted the government's contention (indeed not a single precedent from this Court is offered in EPA's discussion), and with good reason. To hold that Congress may assign the entire adjudication of all federally-created rights to legislative courts of its own creation, completely bypassing the Judiciary, would

[16] *See* cases cited in *Northern Pipeline*, 458 U.S. at 73.

emasculate the separation of powers that Article III was designed to preserve.[17]

III. FIFRA's DELEGATION OF NON-REVIEWABLE LEGISLATIVE POWER TO ARBITRATORS VIOLATES ARTICLE I

Appellees are compelled to seek compensation in a system that is completely lawless. FIFRA establishes no standard for the arbitrator's determination of compensation. It delegates to the arbitrator unfettered discretion to prescribe his own standard and immunizes his decision from judicial control. This abdication of congressional responsibility is unsurpassed by any that has occurred in over fifty years, and violates constitutional limitations on the delegation of legislative authority.

Article I, Section 1, of the Constitution vests all legislative powers in Congress. Congress is not permitted to delegate that authority without defining standards to aid in the statute's implementation.

Since the Court's decisions in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), broad delega-

[17] EPA notes that the Court has rejected due process challenges to certain statutes requiring binding arbitration. (EPA Brief at 19.) That proposition is irrelevant to this case. This case involves private rights which require adjudication in an Article III court. *Northern Pipeline*, 458 U.S. at 80–81. FIFRA's arbitration scheme clearly violates Article III, whether or not it violates due process as well. The cases cited by EPA shed no additional light on the issues raised here. They concern state statutes not subject to Article III challenge, and challenges to the merits of consensual arbitrations under collective bargaining agreements. The case of Switchmen's Union v. National Mediation Board, 320 U.S. 297 (1943), cited by EPA, did not even involve a constitutional issue. *Id.* at 301.

tions of authority to administrative bodies with technical expertise have been sustained. Nevertheless, subsequent decisions illustrate that the non-delegation doctrine remains a valid principle of constitutional government.

Two conditions must be met in order for a delegation of legislative power to be sustained. First, a statute must delineate standards which the delegatee is to apply in the statute's implementation. *INS v. Chadha*, 103 S. Ct. 2764, 2785 n.16 (1983); *Yakus v. United States*, 321 U.S. 414, 426 (1944); *United States v. Robel*, 389 U.S. 258, 274–75 (1967) (Brennan, J., concurring). *See also American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 544–45 (1981) (Rehnquist, J., dissenting); *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, Douglas, and Stewart, JJ., dissenting). Second, the exercise of delegated authority must be subject to judicial review. *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946); *United States v. Robel*, 389 U.S. at 277–81 (Brennan, J., concurring). *See also Arizona v. California*, 373 U.S. at 626 (Harlan, Douglas, and Stewart, JJ., dissenting).

These conditions ensure that "important choices of social policy" are made by Congress; guarantee an "intelligible principle" to guide the exercise of delegated legislative discretion; and provide that "courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards." *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring).

FIFRA says nothing more than that the me-too applicant must "compensate" the data submitter. § 3(c)(1)(D)(ii). Nothing further appears in FIFRA or its

legislative history to define this right or to establish a standard for its determination.

The district court below determined that this is a "standardless delegation of powers." (J.S. App. 19a.) Two other district courts, FMCS, and a former EPA Administrator all have reached the same conclusion. *Sathon, Inc. v. American Arbitration Association*, No. 84 C 6019, slip op. at 7 (N.D. Ill. Mar. 30, 1984), *appeal dismissed*, No. 84-1540 (7th Cir. July 3, 1984) ("there is nothing in the statute (or the regulations promulgated thereunder) relating to the standard to be applied in such proceedings"); *Monsanto Co. v. Acting Administrator, EPA*, 564 F. Supp. 552, 561, 567 (E.D. Mo. 1983), *vacated on other grounds, Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862 (1984) ("there are no discernible guidelines outlining the factors which constitute just compensation for use of [a submitter's] data").

FMCS, discussing the legislative history of the 1978 amendment of FIFRA, observed that neither the House nor the Senate "specified a formula or other guidance on the valuation of data for compensation purposes." 45 Fed. Reg. 55,394 (1980). In declining to impose a standard by regulation, FMCS stated: "The statutory scheme of FIFRA provides that the arbitrators will determine the standards on a case-by-case basis. . . ." 45 Fed. Reg. 28,107 (1980).

Former EPA Administrator Douglas M. Costle implored Congress to define a standard. He told the House Committee on Agriculture that pesticide producers "object to signing a 'blank check' for use of data—that an offer to pay reasonable compensation without knowing what that means in terms of dollars and cents is unpalatable from a business point of view." H.R. Rep. No. 663,

95th Cong., 1st Sess. 59 (1977). The Administrator asked Congress to establish a standard: "It would thus be helpful to applicants if the Congress would make more explicit what factors it feels are pertinent in determining reasonable compensation." *Id.*

As EPA points out, however (EPA Brief at 33 n.27), Congress totally abdicated its responsibility:

> The reasonableness of compensation is difficult to determine . . . . The Subcommittee agreed that the amount and terms of reasonable compensation would be determined by the parties involved . . . .
>
> The Subcommittee also adopted a provision for binding arbitration . . . if the parties fail to agree on compensation.

S. Rep. No. 334, 95th Cong., 1st Sess. 8 (1977). To exacerbate the matter, Congress deleted the adjective "reasonable," which it had used prior to the 1978 amendment of FIFRA to require payment of "reasonable compensation"; substituted a requirement that the applicant "compensate" the data submitter; and immunized the arbitrator's decision from substantive judicial review.

Congress has thus abdicated to an *ad hoc* group of arbitrators the choice of social policy in deciding on what basis compensation should be determined. It has failed to establish any "intelligible principle" to aid the arbitrator in that exercise,[18] and barred the courts from providing a

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[8] In its *amicus* brief, PPG claims that FIFRA establishes a "cost-sharing" standard for compensation. (Brief for PPG Industries, Inc. as *Amicus Curiae*, at 12, 17.) This is a self-serving effort to induce the Court to make a comment in its decision that would bolster PPG's pending district court challenge to the arbitration award arising from its use of Stauffer's data. *See* PPG Industries, Inc. v. Stauffer Chemical Co., No. 83-1941 (D.D.C. filed July 7, 1983). Quite tellingly,

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check against abuse of that undefined delegated authority. This affront to the Constitution's separation of powers cannot be sustained.

IV. THE RELIEF GRANTED BY THE DISTRICT COURT WAS PROPER

A. The District Court Correctly Enjoined The Use Of Data Subject To The Invalid Arbitrator Compensation Scheme

Having found FIFRA's arbitrator compensation scheme unconstitutional, the district court enjoined EPA "from permitting or implementing any use of data where the submitter's compensation is to be determined under the said section 3(c)(1)(D)." (J.S. App. 25a–26a, ¶ 2.) The relief ordered by the district court was proper because FIFRA conditions the use of data upon payment of compensation.

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the arbitrators in that case discerned no such standard and declined to award compensation on the basis of the narrow cost-sharing theory proposed by PPG (or on the basis of the valuation principles proposed by Stauffer).

PPG's argument is, moreover, misleading. The legislative history which PPG cites relates, with one exception, to *pre*-1978 versions of FIFRA. And the exception, PPG's sole reference to the legislative history of the 1978 FIFRA, relates to a *draft* of the statute *which was never enacted*. S. Rep. No. 334, 95th Cong., 1st Sess. 4, 31 (1977). This draft was changed substantially in conference and thus does not illuminate the statute which was enacted.

A full exposition of the legislative history of the 1978 amendments shows that Congress was completely equivocal and expressly declined to establish a compensation standard. *See, e.g., id.* at 8, quoted *supra* at p. 30.

Section 3(c)(1)(D)(ii) authorizes EPA to rely upon an originator's data to grant a registration to a me-too applicant "*only if* the applicant has made an offer to compensate" (emphasis added). The statute provides a "right to compensation for the use of the data." *Id.* Thus, FIFRA establishes an inextricable link between the use of data and compensation.

Congress' purpose in requiring compensation was to prevent "just plain stealing" the use of data, *Federal Environmental Pesticide Control Act: Review of FEPCA Before the House Comm. on Agriculture*, 93d Cong., 1st Sess. 11 (1973) (statement of Rep. Poage, Chairman, House Committee on Agriculture), and to ensure that me-too applicants would not receive a "free ride." *See* S. Rep. No. 838 (Part II), 92d Cong., 2d Sess. 72, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4023, 4091–92. Congress would not have permitted the use of data in the absence of a procedure for obtaining compensation. This was confirmed by Senator Patrick Leahy, a principal sponsor of the arbitration provision:

> [W]e are not allowing free use of . . . data by competitors. If a registrant wishes to use the data generated by another company to support their registration then he must pay compensation for the data . . . .

123 Cong. Rec. 25,706 (1977).

Congress thus viewed compensation as the *quid pro quo* for the use of the submitter's data. The use-compensation system was enacted as "a single statutory grant of jurisdiction," *Northern Pipeline*, 458 U.S. at 87 n.40, and cannot be severed as EPA suggests (EPA Brief at 33 n.28). Enjoining the use of data was the only proper relief

the district court could have granted to effectuate the congressional purpose.[19]

B. The Unconstitutional Arbitration Scheme Must Be Restructured By Congress, Not The Court

Because the arbitration scheme is unconstitutional, it is up to Congress to restructure it in a manner that will comply with Article I and Article III. To satisfy Article I, Congress must establish an intelligible principle for awarding compensation. To comply with Article III, Congress must provide for the exercise of judicial power by Article III courts "at all stages of adjudication, and not only on appeal." *Northern Pipeline*, 458 U.S. at 86 n.39.

Although Congress' attempt to establish an arbitration scheme with no set standard, insulated from the authority of the Judiciary, is unconstitutional, these features of the scheme are a fundamental part of Congress' plan for resolving compensation disputes through arbitration "within the private sector" in a manner that does "not require

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[19] Contrary to EPA's assertion, the district court did not enjoin EPA from implementing "the entire data licensing system." (EPA Brief at 29.) The district court's order restrained only those uses of data for which compensation must be sought in an unconstitutional arbitration. (J.S. App. 25a–26a.) Many data are not subject to the compensation scheme at all, and may be used without any offer to pay compensation (e.g., data in the public literature, data submitted prior to 1970, or data which are more than 15 years old). Furthermore, EPA will remain able to register new pesticides; applicants for registration may submit their own test data to support their applications, and may rely on previously submitted data if the submitters have given permission. Ruckelshaus v. Monsanto Co., 104 S. Ct. 3, 4 (Blackmun, Circuit Justice, 1983). EPA adopted interim procedures to permit registration in this manner. *Id.*

active governmental involvement." 123 Cong. Rec. 25,710 (1977) (statement of Sen. Leahy).

Congress made its intent quite plain. It provided for arbitration that is "binding." It stated that "the findings and determination of the arbitrator shall be final and conclusive," and it declared that "no official or court of the United States shall have power or jurisdiction to review any such findings and determination." § 3(c)(1)(D)(ii). It declined EPA's specific request to define how compensation should be determined, and instead lodged that authority with *ad hoc* arbitrators to be decided on a case-by-case basis. (*See supra* p. 29.) Thus Congress' restructuring of the compensation system in 1978, from an administrative system with full judicial review, to an arbitration scheme with no review, obviously was a deliberate plan to effectuate the congressional purpose of establishing a non-governmental dispute resolution mechanism.

Moreover, the preclusion of substantive judicial review is the hallmark of the arbitration process:

> If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact.

Burchell v. Marsh, 58 U.S. (17 How.) 344, 349 (1855). *See also* 5 Am. Jur. 2d *Arbitration and Award* § 140 (1962); M. DOMKE, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION*, 254–56 (1968); 6 C.J.S. *Arbitration* § 70 (1975).

Under these circumstances, it cannot be said that if Congress had been aware that the arbitration system's lack of standards and judicial review rendered it unconstitutional, it would have chosen a hybrid form of reviewable arbitration as the vehicle for deciding compensation

disputes. The type of judicial involvement required by Article III is generally avoided in arbitration, and would defeat Congress' purpose of resolving compensation disputes in the private sector without governmental involvement.

EPA suggests that FIFRA's constitutional defects could be cured if the Court were to strike all of the language in the statute which indicates that the arbitrator's decision is to be binding, final, conclusive and non-reviewable, and were to read a right of judicial review into the statute (and, presumably, were to supply standards to guide the arbitrator and to test his decision in court review). (EPA Brief at 30.)

Whether a court can sever and restructure a statute is a question of legislative intent. *INS. v. Chadha*, 103 S. Ct. at 2774–75. The presence of a severability clause "may sometimes aid in determining that intent. But it is an aid merely; it is not an inexorable command." *Williams v. Standard Oil Co.*, 278 U.S. 235, 241 (1929) (quoting *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924)). The court may not sever selected portions of a statute if there is a "clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains." 278 U.S. at 242.

Here, Congress' intent to keep compensation disputes out of the courts and within the private sector is quite clear. To shift the adjudicatory functions from the arbitrators to the courts under these circumstances would fundamentally alter the design of the arbitration scheme and thwart Congress' purpose.[20]

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[20] Had Congress envisioned the constitutional infirmities in the arbitration system it created in 1978, it may very well have adopted

(continued)

Similarly, it is fallacious for EPA to suggest that severance of the portions of FIFRA that bar judicial review somehow would affirmatively create a right to judicial review. (EPA Brief at 31.) Whether a right of review will be inferred is purely a question of congressional intent. *Block v. Community Nutrition Institute*, 104 S. Ct. 2450, 2456 (1984); *Southern Ry. Co. v. Seaboard Allied Milling Co.*, 442 U.S. 444, 454–63 (1979). Here, Congress made it manifestly clear that it wanted to preclude substantive judicial review. Striking Congress' words from the statute cannot alter its plain intent that the courts are not to review arbitration decisions.[21]

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an entirely different scheme altogether. Indeed, in 1982 the House of Representatives, joined by the Senate Committee on Agriculture, Nutrition and Forestry, approved substitute legislation that would have abandoned the arbitration system and replaced it with different forms of research incentives and protections for proprietary trade secret information. *See* S. Rep. No. 551, 97th Cong., 2d Sess. 9 (1982).

[21] Furthermore, the Court has rejected the contention that EPA makes here that a right to substantive judicial review arises out of 28 U.S.C. § 1331. Switchmen's Union v. National Mediation Bd., 320 U.S. 297, 301–06 (1943). The case cited by EPA, International Ass'n of Machinists v. Central Airlines, 372 U.S. 682 (1963), merely recognizes jurisdiction under § 1331 to *enforce* an award of an airline board of adjustment, not to obtain substantive judicial review of an award.

The contention of *amici* Griffin and Drexel that FIFRA § 16(c) creates a private cause of action, which would encompass judicial review of arbitrators' decisions (Brief of Griffin Corporation and Drexel Chemical Company as *Amicus Curiae*, at 16), has been rejected by every court in which it has been raised, and the government has consistently maintained that no such right of action exists. *See, e.g.*, In re Agent Orange Product Liability Litigation, 635 F.2d 987, 991 n.9 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981); Fiedler v. Clark, 714 F.2d 77, 79–80 (9th Cir. 1983).

The courts "cannot rewrite a statute and give it an effect altogether different from . . . the measure . . . as a whole." *Railroad Retirement Board v. Alton Railroad*, 295 U.S. 330, 362 (1935). "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California v. Sierra Club*, 451 U.S. 287, 297 (1981). A statute which expressly prohibits judicial review may not be rewritten by the courts in order to cure a constitutional defect. *Swain v. Pressley*, 430 U.S. 372, 376–78 (1977).

The Court thus should leave it to Congress to reformulate a constitutional method for adjudicating compensation disputes. As the Court similarly concluded in *Northern Pipeline*, "it is for Congress to determine the proper manner of restructuring the [statute] to conform to the requirements of Art. III in the way that will best effectuate the legislative purpose." *Northern Pipeline*, 458 U.S. at 88 n.40.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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